SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 73-1203

HAWAIIAN AIRLINES, INC., *Petitioner,*

vs.

HONORABLE SAMUEL P. KING, Judge of the United States District Court for the District of Hawaii, *Respondent,*

and

ALOHA AIRLINES, INC., *Real Party in Interest.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner Hawaiian Airlines, Inc. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case (Court of Appeals No. 73-3248) in which the Court of Appeals, on December 12, 1973, denied Hawaiian Airlines' petition for writ of mandamus.

OPINIONS OF THE COURTS BELOW

This case arises out of the action by the District Court below in which the respondent judge (1) ruled "that the time had long since passed when you could argue that it (discovery) was irrelevant" (App. B, p. iv)[1]; (2) permitted discovery for the sole purpose of establishing a *pari delicto* defense to petitioner's antitrust counterclaim; and (3) circumvented this Court's decisions in *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) and *Keifer-Stewart Co. v. Joseph Seagram & Sons*, 340 U.S. 211 (1951) by observing that "On the basis of discovery they (Aloha, real party in interest) might well file a suit." (App. B, p. v). The order of the District Court, dated November 19, 1973, is not reported but is set forth as Appendix A hereto.

On November 28, 1973 petitioner Hawaiian Airlines, Inc. (hereinafter "HAL") filed its petition for writ of mandamus and/or prohibition to restrain the District Court and real party in interest Aloha Airlines, Inc. (hereinafter "Aloha") from pursuing the discovery of information which was solely for the purpose of supporting Aloha's attempt to assert a *pari delicto* defense to HAL's antitrust counterclaim.

HAL's petition for writs of mandamus and/or prohibition was denied by the United States Court of Appeals for the Ninth Circuit on December 12, 1973. The order of the Court of Appeals is not reported but is set forth as Appendix C hereto.

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[1]Excerpts from the transcript of oral argument relating to the reasons for granting discovery are attached as Appendix B.

JURISDICTION

The judgment and order denying HAL's petition was entered on December 12, 1973. (See Appendix C.) No rehearing or extension of time was either sought or granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the liberal interpretation of the discovery rules is so broad as to completely eliminate any consideration of the relevance of the information sought?

2. Whether the decision by the court below permitting discovery for the sole purpose of establishing a *pari delicto* defense in an antitrust suit is contrary to this Court's decisions in *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) and *Kiefer-Stewart Co. v. Joseph Seagram & Sons*, 340 U.S. 211 (1951)?

3. Whether discovery of evidence for the sole purpose of establishing a defense which this Court has ruled is not available can be nonetheless permitted on the ground that "On the basis of (the) discovery they might well file a suit"?

STATEMENT OF THE CASE

A. Nature of the Case

This is a private treble damage antitrust action initiated by plaintiff Aloha against defendant (petitioner) HAL pursuant to Section 4 of the Clayton Act (15

U.S.C. §15). By way of counterclaim, HAL charged Aloha with *inter alia* unlawful agreements between Aloha and third parties to deal exclusively with Aloha. HAL also charged Aloha with bringing its instant suit in furtherance of its scheme to unlawfully destroy HAL.

B. Parties

Aloha and HAL are competing air carriers incorporated under the laws of the State of Hawaii with their principal offices located in Honolulu, Hawaii. As air carriers, both operate under certificates of public convenience and necessity granted by the CAB and are subject to comprehensive federal statutory and regulatory provisions promulgated by Congress and the CAB.

C. Relevant Facts

HAL sought discovery from Aloha relative to HAL's charges that Aloha had entered into exclusive dealing agreements with third parties and that Aloha had brought its suit in furtherance of its scheme to destroy HAL.

At no point in this litigation has Aloha charged HAL with entering into exclusive dealing arrangements nor with bringing its counterclaim in bad faith. Yet that is precisely the type of conduct covered by the discovery order of the District Court below. Aloha sought to discover information relating to these issues on the sole ground that Aloha's Fourth Affirmative Defense alleged that it is immunized from liability and HAL's counterclaim is barred because HAL engaged in similar conduct. In its brief filed in support of its motion to produce, Aloha simply stated that the documents sought were

". . . relevant to its defense to defendant's counterclaims." (Aloha, Brief p. 4.) Aloha argued:

> ". . . (Aloha) has alleged as its Fourth Affirmative Defense that the actions alleged in (HAL's) counterclaim were fair and not illegal in that their purpose was intended only to resist deterioration of its own position . . . .
>
> • • •
>
> ". . . this type of *defense* if established will *bar* Hawaiian from both recovery of damages and injunctive relief." (Aloha, Brief p. 4.)

In oral argument on the motion to produce, the District Court refused to even consider the relevancy of the information sought by Aloha (App. B, pp. iv, v), observing that: "I thought that the time had long since passed when you could argue that it (discovery) was irrelevant" and "That's almost going back to the aardvark." After confronting the District Court with this Court's decision regarding the *pari delicto* defense, the court below observed: "On the basis of discovery they (Aloha) *might* well file a suit." (App. B, p. v.)

However, Aloha has not charged HAL with illegality in its dealings. Aloha, by its own admission, seeks the documents here ordered for discovery only to establish an *in pari delicto* defense.

REASON FOR GRANTING THE WRIT

THE RULING OF THE DISTRICT COURT BELOW THREATENS THE EFFICACY OF PRIVATE ANTITRUST ENFORCEMENT BY FAILING TO RECOGNIZE, OR EVEN CONSIDER THE IRRELEVANCE, AS A MATTER OF LAW, OF AN ATTEMPT TO ESTABLISH AN IN PARI DELICTO OFFENSE TO PETITIONER'S ANTITRUST CLAIM.

The Federal Rules encourage broad and liberal discovery. However, to protect against abuse in the discovery process, the party seeking information must stand ready to demonstrate the relevance of the material sought to the issue in the case. See *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 925 (5th Cir. 1964); *Portsmouth Baseball Club v. Frick*, 19 F.R.D. 195 (S.D.N.Y. 1956). In *Metzger Dairies* the Fifth Circuit stated (334 F.2d at p. 925):

> "... Full and complete discovery should be practiced and allowed, but its processes must be kept within workable bounds on a proper and logical basis *for the determination of the relevancy* of that which is sought to be discovered." [Emphasis added.]

In this day of overcrowded court dockets and complex and prolonged litigation, the liberality of pretrial discovery should not be abused. A party's discovery attempts should not, as here, be used as a fishing expedition seeking factual data which is not only immaterial, but irrelevant as a matter of law. And, to be sure, discovery is not a tool designed for the benefit of those who "On the basis of discovery . . . might well file a suit."

Petitioner HAL submits that the information sought by Aloha is irrelevant as a matter of law because its only purpose would be to establish that HAL engaged

in conduct similar to that charged against Aloha. Such an assertion of *pari delicto* is, as a matter of law, unavailable as a defense to HAL's antitrust counterclaim. Accordingly, the information sought is wholly irrelevant to the issue in the present case. The District Court abused its discretion by refusing to recognize, or even give consideration to, HAL's objections to the relevancy of the information sought by Aloha.

Aloha does *not* claim, as it cannot, that its discovery is relevant to its allegations against HAL. The sole claim of Aloha is that, by reason of its fourth Affirmative Defense, the requested documents are relevant to legalize its antitrust violations and to immunize itself against liability for the injury caused to HAL by reason of Aloha's violations:

> ". . . [Aloha] has alleged as its fourth Affirmative Defense that the actions alleged in [HAL's] counterclaim were fair and not illegal *in that their purpose* was intended only to resist deterioration of its own position. . . .
>
> ". . . .
>
> ". . . this type of *defense* if established will bar Hawaiian from both recovery of damages and injunctive relief." (Aloha's Brief, p. 4.)

Aloha's argument is diametrically opposed to the principle articulated by this Court in *Kiefer-Stewart Co. v. Joseph Seagram & Sons,* 340 U.S. 211 (1951):

> "The alleged illegal conduct of petitioner, however, could *not* legalize the unlawful combination by respondents *nor* immunize them against liability to those they injured. [cites omitted]" 34 U.S. at 214.

More recently in the *Perma-Life Mufflers* case, this Court stated (392 U.S. at 138-139):

> "Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari.
>
> ". . .
>
> "We find ourselves in complete disagreement with the Court of Appeals. There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although *in pari delicto* literally means 'of equal fault', the doctrine has been applied correctly or incorrectly in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violations. Similarly, in *Simpson v. Union Oil Co.,* 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were

> premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra.*"

These decisions by this Court serve the strong public policy which favors the private enforcement of the antitrust laws. If the antitrust defendant believes the antitrust plaintiff to be equally guilty of antitrust violations, he is not without remedy. This Court clearly stated that those equally at fault "remain fully subject to civil and criminal penalties for their own illegal conduct. *Perma-Life Mufflers, supra,* 392 U.S. at 139. This clear guideline insures the prosecution of antitrust violations rather than the erection of barriers against full enforcement. Even the antitrust violator himself is encouraged to bring suit if he believes the antitrust plaintiff to be equally at fault. If it were otherwise, then one would be encouraged to violate the antitrust laws, knowing that his violation would be "judicially sanctioned" by the fact of another's violation.

The above-cited decisions of this Court, particularly the *Perma-Life Mufflers* case, make it clear that the *in pari delicto* defense pursued by Aloha in the Court below is improper. The action of the District Court in permitting Aloha to pursue that defense would necessarily weaken antitrust enforcement through private civil suits and jeopardize the application of this Court's rulings in cases such as *Perma-Life Mufflers*.

CONCLUSION

For the foregoing reasons, this Court should grant HAL's petition for writ of certiorari and direct the Courts below to prohibit Aloha from further discovery and other attempts to pursue and establish an *in pari delicto* defense to petitioner's antitrust claims.

Respectfully submitted,

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January 31, 1974.

(Appendices Follow)

Appendix A

In the United States District Court
For the District of Hawaii

Civil No. 72-3594

Aloha Airlines, Inc.,
Plaintiff,
vs.
Hawaiian Airlines, Inc.,
Defendant.

ORDER COMPELLING PRODUCTION OF DOCUMENTS BY DEFENDANT

Plaintiff having filed its Second Request for Documents on February 15, 1973 and its Third Request for Documents on July 18, 1973 under Rule 34 of the Federal Rules of Civil Procedure; defendants objecting to said request and failing to produce said documents; plaintiffs bringing on its Motion to Compel Production under Rule 37 of the Federal Rules of Civil Procedure on August 30, 1973; both parties having filed legal memoranda thereon; and argument having been heard on September 7, 1973;

It Is The Order Of This Court that plaintiff's motion be granted pursuant to its decision of September 14, 1973.

Defendants shall respond and produce documents as to each category under the number paragraphs in the

second and third requests, respectively. Documents will be produced separately for each category. Where there is no document for a particular category or such request has previously been fulfilled, such notation shall be noted.

Dated: Honolulu, Hawaii, November 19, 1973.

Samuel P. King
Judge of the Above-Entitled Court

Approved:

Vernon F. L. Char
Attorney for Plaintiff

Daniel H. Case.
Attorney for Defendant

Appendix B

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT BEFORE THE DISTRICT COURT, SEPTEMBER 7, 1973

(pages 44-50)

. . . and you can't view these attempt to monopolize charges or the charge of what market impact this arrangement had in a vacuum. And they simply say to us the fact that we may be doing this doesn't exonerate you. Well, it isn't a pari delicto argument. It isn't saying —we're not saying: You've lost your right to sue us because you do this. What we're saying is: We can't defend ourselves by persuading the trier of fact that all we're doing is acting in self-defense because you're doing these very same things and I don't understand how we could conceivably defend the counterclaim absent that kind of evidence and it's evidence, Your Honor, that they're peculiarly seized of. We don't know the details of who they made these payments to. We know they made them. We know perfectly well they've made them and they haven't denied it yet. And what they're simply trying to do is say: We're going to tar you people and show what you've done, but you can't defend yourselves saying this is the recognized industry practice, if you will, or this is the way business is conducted and negate that we acted with the predatory intent by showing that this is the way it's being done. I don't understand the opposition to this.

The Court: Mr. Alioto?

Mr. Alioto: May I explain it to him? I first would like to point out, Your Honor, that I don't understand how they say one thing in the brief and they say another

thing. They told us in the brief—and we filed a response to it—they said in the brief at Page 4: This type of defense if established will bar Hawaiian from recovery of damages and injunctive relief. Now they say it won't. So, I don't know which one of their positions we're supposed to take at any one time. The law is clear, Your Honor.

We have not denied these charges because Aloha has not made the charge. If it wants these kinds of documents or wants to get into this, it has to make a similar charge. It cannot use it as a defense. It is not a defense. We cited the three Supreme Court cases that show it is not a defense and that they cannot escape liability for what we believe and we have evidence—we have to search it out because it's only hearsay—that they were willing to give as much as $300,000 to take something like a million dollars worth of business, but——

The Court: We're really only talking about discovery, aren't we?

Mr. Alioto: They are not entitled to it, Your Honor. If they charged us with such—if they charged us with such an offense, then they would be entitled to it. They cannot argue to a jury or otherwise or to the Court or seek——

The Court: I thought that the time had long since passed when you could argue that it was irrelevant. I expected you to come up with something like it was prejudicial or onerous or——

Mr. Alioto: No; no——

The Court: ——but irrelevant—I really hate to sit on an argument that a discovery matter is irrelevant. That——

Mr. Alioto: May I——

The Court: That's almost going back to the aardvark.

Mr. Alioto: That is—I believe, Your Honor, that that is correct except for one thing: That particular rule does not apply in the antitrust laws and we've cited the case Perma Life in 1968, Kiefer-Steward in 1951 and Fashion Originators Guild, 1941, and in each one of those, this is what the Supreme Court says. I think it's very, very important.

The Court: What were those years again?

Mr. Alioto: 1968. Perma Life is the important one, Your Honor. We have cited it pretty heavily in the brief that we filed. It is Perma Life Mufflers, United States Supreme Court——

The Court: What do they say about discovery?

Mr. Alioto: It says: Both Simpson—which is another Supreme Court case—this is in the Perma Life—both Simpson and Kiefer-Stewart were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy . . . .

The Court: What has that got to do with discovery?

Mr. Alioto: Because they're not entitled to it.

The Court: On the basis of discovery they might well file a suit.

Mr. Alioto: They just gave information and belief, Your Honor. If they feel that that information—they can

file a suit on information and belief. It's clear what happened, Your Honor. We have charged them with this. We have pretty good evidence on it. We came before the Court less than a month ago. We asked for the production of those documents, the Court gave us the production of the documents or ordered the production. When we attempt to get the production of the documents, they file a similar request on us for the same thing. Two wrongs don't make a right in the antitrust laws.

The Court: But we're talking about discovery. Have you got any claim really that what they're asking for is onerous, confidential, et cetera, et cetera or are you just objecting because you say it wouldn't be introducible at trial?

Mr. Alioto: That's right.

The Court: What has that got to do with discovery? We would sit here all day long doing nothing but arguing discovery motions if we sat here on arguments that it was irrelevant.

Mr. Alioto: Your Honor, the Supreme Court has said that that is irrelevant.

The Court: What you're saying is I should try this case piecemeal on every objection to a question in discovery and that's what I'm objecting to. If you brought up something that said that this was too onerous or that you are getting into something—or you have a right to resist or some ground other than relevance, this is what bothers me.

Mr. Alioto: Your Honor, this is almost like a whole new lawsuit. This is a special allegation and I would submit to the Court—I would submit this to the Court—that the Supreme Court has said: If you think the other

party has done something, then you file a suit against them or let the government file a suit against them, but you are not going to be permitted to raise a defense to your per se violation and let anybody—any court permit you to defend against it because the other party did the same.

The Court: I'd feel a lot better about it if you had some recent cases that said it was a good excuse to deny discovery that it was irrelevant.

Mr. Alioto: It is——

The Court: I would feel a lot better about it. You are not saying that it's onerous, are you?

Mr. Alioto: No, sir; I am not.

The Court: You are just saying that it's irrelevant.

Mr. Alioto: Yes, sir; I am. And based on the Supreme Court's decision in Perma Life. I wish that the Court would read that.

The Court: Are you saying that irrelevant matter is not discoverable?

Mr. Alioto: This matter—they haven't said that—they haven't said that this matter is going to lead to relevant evidence to support their other charges, Your Honor.

The Court: Is that the rule of discovery? That you can't discover anything unless you——

Mr. Alioto: If it's irrelevant, then how is it discoverable? It has to be relevant or lead to relevant evidence.

The Court: Or may.

Mr. Alioto: Or may, but they haven't said how it may to any of their charges. They cannot.

The Court: Well——

Mr. Alioto: All right, Your Honor.

The Court: Your only argument is that it's irrelevant, right?

Mr. Alioto: May I just read one final very short sentence? It's in the Supreme Court decision in Kiefer-Stewart. It's also cited in Perma Life. It says, "The alleged illegal conduct of petitioner, however, could *not* legalize the unlawful combination by respondents *nor* immunize them against liability to those they injured." If the Court would read their moving papers, they say that this information is relevant to their defense, that's all—their defense. As a matter of law—as a matter of law, they're not entitled to it.

Appendix C

United States Court of Appeals for
The Ninth Circuit

No. 73-3248

Hawaiian Airlines, Inc.,
Petitioner,
vs.
U.S. District Court, District of Hawaii,
Respondent,
Aloha Airlines, Inc.,
Real Party in Interest.

[Filed Dec. 12, 1973]

Before: ELY and GOODWIN, Circuit Judges

ORDER

The writ of mandamus sought by petition filed herein on November 28, 1973, is denied.

/s/ Walter Ely
/s/ Alfred Goodwin
U. S. Circuit Judges